12/6/90 N.Y.L.J. 21, (col. 3)

New York Law Journal
Volume 204, Number 109

Thursday, December 6, 1990

Court Decisions
Decision of the Day
Appellate Division: First Department

RENT STABILIZATION LAW: REGULATION DEFINING "FAMILY"

RENT STABILIZATION ASSOCIATION OF NEW YORK INC., ET AL., PLAINTIFFS-RESPONDENTS, AND SMALL PROPERTY OWNERS OF NEW YORK, PLAINTIFF-INTERVENORS-RESPONDENT, v. HIGGINS, DEFENDANT-APPELLANT, AND WELLS, ET AL., DEFENDANTS-INTERVENORS-APPELLANTS; AND ANOTHER ACTION. DECIDED DEC. 4, 1990. BEFORE ROSS, J.P.; MILONAS, ASCHE AND ELLERIN, JJ.

Ross, J.

IN THESE consolidated appeals, the above-named defendant-appellant and defendants-intervenors-appellants each appeal from an order of the Supreme Court, New York County (Irma Vidal Santaella, J.), entered on April 20, 1990, herein deemed as one granting a preliminary injunction; and the plaintiffs-appellants appeal from an order of said court entered on April 10, 1990 which denied their application for a contempt order.

Sherwin Belkin, of counsel (Magda L. Cruz and Martin J. Heistein with him on the brief; Belkin Burden Wenig & Goldman, attorneys) for plaintiffs-respondents and plaintiffs-appellants.

Ronald D. Hariri, of counsel (Abady, Jaffe & Hariri, attorneys) for plaintiff-intervenor-respondent and plainitff-intervenor.

Cullen S. McVoy, of counsel (Daniel E. Konig and Harvey M. Berman, with him on the brief; Dennis B. Hasher and Robert Abrams, attorneys) for defendant-appellant

Lynn Kelly, of counsel (Janet Sabel, Sandra R. Farber, Paris Baldacci, and Diane Lutwak, with her on the brief; Jane E. Booth, Kathleen Masters, Douglas J. Seidman and Douglas E. Hoffman, attorneys) for The Legal Aid Society, on behalf of defendants-intervenors-appellants, Disabled In Action and Kairos Rencher

William B. Rubenstein, attorney (Nan B. Hunter of counsel) for the American Civil Liberties Union; and Evan Wolfson and Paula Ettelbrick, attorneys, for the Lambda Legal Defense and Education Fund, Inc., on behalf of

12/6/90 N.Y.L.J. 21, (col. 3)

defendants-intervenors-appellants, Gay Men's Health Crisis, Inc., Everett Quinton and Robert Wells

Robert H. Gordon, of counsel (Frank J. Barbaro, attorney) for defendant-intervenor-appellant, Janet Goodman

Jane S. Earle, of counsel (Leonard Koerner and Phyllis Arnold with her on the brief; Victor A. Kovner, attorney) for The City of New York, as Amicus Curiae

Samuel J. **Himmelstein,** of counsel (Rochelle K. Benjamin, William Griben, Kevin R. McConnell, with him on the brief; **Himmelstein &** McConnell, attorneys) for NYS Tenant and Neighborhood Coalition Inc., Metropolitan Council on Housing, Asian Americans for Equality, Action Council for Tenants of Yonkers, Association for Neighborhood and Housing Development Inc., Bronx Independent Living Services Inc., Citizens Advice Bureau, Inc., Coalition for the Homeless, Inc., Cooper Square, Flatbush East Community Development Corp., Good Old Lower East Side, Joint Public Affairs Committee for Older Adults, Latino Housing Network, Local 1199 Drug Hospital and Health Care Employees Union, RWDSU AFL-CIO, Mount Vernon United Tenants, Neighborhood Initiatives Development Corporation, New York City Labor/Religion Coalition, New York Hispanic Housing Coalition, Pueblo Nuevo, Puerto Rican Legal Defense and Education Fund Inc., Queens League of United Tenants, Riverside Edgecombe Neighborhood Association, South Side United Housing Development Fund Corporation, Tenants Coalition of Nassau County, The Lower East Side Joint Planning Council, United Auto Workers Local 259, and West Side SRO Law Project, as Amici Curiae.

Kleo J. King, attorney for Eastern Paralyzed Veterans Association, as Amicus Curiae.

William E. Rosen, of counsel (Horing & Welikson, attorneys) for Community Housing Improvement Program, as Amicus Curiae.

Jody Leight, attorney for Jewish Association for Services for the Aged, as Amicus Curiae.

Carol S. Keenan, of counsel (Klein & Keenan and Ronald A. Zumbrun, Edward J. Connor Jr. and R.S. Radford, attorneys) for Pacific Legal Foundation, as Amicus Curiae

ROSS, J.--The primary issue on these appeals, is whether the IAS Court properly enjoined the implementation of the emergency rule and subsequent amendment to the State Division of Housing and Community Renewal's permanent regulations, adopted in order to conform and/or broaden the administrative regulations governing lease succession rights and anti-eviction protections, under the State and City of New York Rent Control and Rent Stabilization Systems, in accordance with the Court of Appeals' decision in Braschi v. Stahl Associates Co. (74 NY2d 201).

In Braschi v. Stahl Associates Co., supra, the Court held that the term "family" as used in § 2204.6(d) of the New York City Rent and Eviction Regulations, (9 NYCRR § 2204.6(d), Rent Control Law) includes "two adult lifetime partners whose relationship is long term and characterized by an emotional and financial

commitment and interdependence" (74 NY2d at p. 211). On Nov. 9, 1989, the State Division of Housing and Community Renewal (DHCR) began the process of amending the four sets of administrative regulations under its administration, [FN1] to provide for leasehold succession rights in accordance with the broad definition of the term "family" set out in Braschi v. Stahl Associates Co., supra, by promulgating an emergency rule applicable to all four sets of regulations. The emergency rule broadened the definition of family members entitled to succession rights to include, in addition to those traditional relations previously named, those individuals residing in the housing accomodation, with the tenant of record, as a primary residence, who can prove emotional and financial commitment and interdependence between themselves and the tenant of record. The rule lists the following eight factors to be considered in determining whether the requisite emotional and financial commitment and interdependence existed: length of relationship; sharing of expenses; intermingling of finances; engaging in family-type activities; formalization of legal obligations and responsibilities between the two parties; holding themselves out as family members through words or acts; regular performance of family functions; and any other pattern of behavior which evidences the intention of creating a long term, emotionally-committed relationship. Whereas, prior Rent Stabilization regulations provided for succession either, where the family member of the named tenant has resided in the housing accommodation as a primary resident from the inception of the tenancy or commencement of the relationship, and the named tenant vacates the premises (9 NYCRR 2523.5[b][1]) or, where a family member has resided with such tenant in the housing accommodation as a primary resident for a period of no less than two years immediately prior to the death of the tenant (9 NYCRR 2523.5[b][2], [FN2] the emergency rule eliminated the distinction between the tenant of record's death and the tenant of record's departure. In either case, the family member would succeed to the rights of the tenant of record upon the tenant of record's permanent vacatur of the housing accommodation provided the family member resided with the tenant of record as a primary resident, either, for not less than two years (one year in the case of senior citizens [62 years or older] and disabled persons) or, from the inception of the tenancy or commencement of the relationship (if the tenancy or relationship were less than two years, or one year old, as the case may be.).

Plaintiffs commenced the within declaratory judgment action seeking a declaration that the emergency rule is null and void, ultra vires and unconstitutional, as a taking of property without just compensation. The complaint also alleges that the rule violated Real Property Law § 226-b which regulates the assignment of leases; Real Property Law § 235-f which creates a right of occupancy but not leasehold rights for roommates; Domestic Relations Law § 11 which sets out the requirements and means for the solemnization of a marriage; and the administrative limitations in the Omnibus Housing Act of 1983, and the State Administrative Procedure Act.

By order to Show Cause dated Nov. 13, 1989 plaintiffs moved in Supreme Court, Albany County, for a preliminary injunction enjoining the implementation of the emergency rule. An order to show cause was granted, which restrained the DHCR from "implementing or effectuating said Emergency Rule, or in any other manner promulgating, issuing, implementing or effectuating the terms, conditions or requirements thereof," but made the motion returnable in Supreme Court, New York County.

12/6/90 N.Y.L.J. 21, (col. 3)

On Nov. 15, 1989, counsel for the plaintiffs and the DHCR entered into a stipulation which provided that the Nov. 13, 1989 Order to Show Cause would not be construed to preclude the DHCR from taking ministerial actions necessary to comply with the procedures required for the promulgation of the regulatory amendments, which are the subject of this action, such as the filing of required Regulatory Impact Statements and Regulatory Flexibility Analyses with the Secretary of State.

On Dec. 13, 1989, the New York County IAS Court heard argument, and again extended the TRO pending determination of the preliminary injunction motion. During oral argument on the motion, the Court was informed that the DHCR was in the process of promulgating permanent regulations and had already sent out notices that a public hearing was scheduled for Jan. 22, 1990.

On Feb. 7, 1990, the DHCR filed with the Secretary of State for a 60-day extension of the emergency rule, and on March 20, 1990 the DHCR filed permanent regulations with the Secretary of State, identical in substance to the emergency rule. Plaintiffs, by Order to Show Cause, moved for a preliminary injunction enjoining the implementation of the permanent regulations on the same grounds used to attack the emergency regulation, and for leave to file a supplemental complaint to assert causes of action against the permanent regulations. Plaintiffs also served a demand for compliance with CPLR 5104, claiming that the promulgation of the permanent regulations violated the original TRO.

In the interim, on March 19, 1990 the defendant-intervenors moved by Order to Show Cause to vacate the TRO on the ground that this Court's March 13, 1990 decision in East 10th Street Associates v. Goldstein Estate, (154 AD2d 142) established conclusively the lack of plaintiff's likelihood of success on the merits. In East 10th Street Associates v. Goldstein Estate, supra, this Court held that the extended definition of "family" set out in Braschi v. Stahl Associates Co., supra, and applied therein to a rent controlled apartment, also controlled in the case of a rent stabilized apartment in New York City, since "there is no significant distinction between the two regulatory schemes which would mandate a different definition of [the term] 'family' " (East 10th Street Associates v. Goldstein Estate, supra, at page 145).

On April 4, 1990, the permanent regulations were published effective immediately.

The IAS Court, in an order entered April 10, 1990, provided that the TRO imposed by the Supreme Court, Albany County on Nov. 13, 1989 was extended to cover the permanent regulations, pending the Court's determination of the plaintiff's motion for a preliminary injunction. The DHCR appealed. Plaintiffs' moved in this Court for an order dismissing the appeal from the April 20, 1990 order on the ground that it was a nonappealable temporary restraining order. Alternatively, plaintiffs sought to vacate the CPLR 5519(a)(1) stay. By order entered May 15, 1990 this Court, sua sponte, deemed the order entered April 20, 1990 as one which granted a preliminary injunction, and provided that the statutory stay would be vacated unless the appeal was perfected for the October 1990 term of this Court. The plaintiffs' challenge to the regulations is based to a large extent, upon their contentions that the promulgation of the challenged regulations is beyond the scope of the DHCR's rule making authority, and that the regulations are contrary to the expressed legislative intention and policy, in the areas of lease succession rights, and domestic relations. [FN3] We disagree.

12/6/90 N.Y.L.J. 21, (col. 3)

For the following reasons, we reverse the order entered April 20, 1990, and vacate the preliminary injunction enjoining the implementation of the permanent regulations, and decline to review the denial of the Order to Show Cause seeking to hold the respondent Commissioner in contempt.

Fundamental to a party's entitlement to a preliminary injunction is a demonstration that the party has a likelihood of success on the merits. (Grant Co. v. Srogi, 52 NY2d 496, 517). We are guided here, as we were in Festa v. Leshen (145 AD2d 49, 55), by the standard of judicial review set forth in Ostrer v. Schenck, (41 NY2d 782, 786): "The function of a reviewing court is a limited one. The challenger of a regulation must establish that the regulation 'is so lacking in reason for its promulgation that it is essentially arbitrary.' " As this Court has recognized in the past, an administrative agency may not, in the exercise of its rule making authority, promulgate a regulation out of harmony with the plain meaning of statutory language. (Festa v. Leshen, supra, p. 55, see, Matter of Lower Manhattan Loft Tenants v. New York City Loft Board, 104 AD2d 223, 225 aff'd 66 NY2d 298; see also, Finger Lakes Racing Assoc. v. New York State Racing and Wagering Board, 45 NY2d 471, 480-481; Matter of Jones v. Berman, 37 NY2d 42, 53). "Similarly, an agency may not, in excess of its lawfully delegated authority, promulgate rules and regulations for applications to situations not within the intendment of the statute." (Id., see Boreali v. Axelrod, 71 NY2d 1; Matter of Trump-Equitable Fifth Ave. Co. v. Gliedman, 57 NY2d 588, 595).

This Court has specifically stated that the succession provisions to which the challenged regulations were added are "remedial in nature" and "should be liberally construed to carry out the reform intended and spread its beneficial effects as widely as possible." (Festa v. Leshen, supra, p. 56, quoting Lesser v. Park 65 Realty Corp.; 140 AD2d 169, 173). In Festa v. Leshen, supra, p. 56, this Court held that the DHCR acted rationally and within the scope of its lawfully delegated authority in promulgating the Rent Stabilization Code Amendments, which provided that relatives who reside with the named tenant may succeed to the tenant's lease rights, upon the tenant's death or abandonment of the dwelling. It was therein noted that the DHCR was delegated the authority, by the Legislature, to amend the Rent Stabilization Code and to adopt a code which in general, protects tenants and the public interest (145 AD2d 56). We specifically found that the regulations challenged in Festa v. Leshen, supra, were enacted in a legitimate exercise of its authority, in order to avoid a "grievous harm" to the family members of tenants of record, in Rent Stabilized apartments, who die or abandon the family dwelling. We stated:

"The challenged regulations reflect DHCR's measured response to the Sullivan decision (66 NY2d 489, supra), which had the potential to expose spouses and children to summary eviction with little or no hope of finding affordable housing in New York City. Such a situation surely posed at least as serious a threat "to the public health, safety and general welfare" (Administrative Code § YY51-1.0) as the eviction of the named tenant with whom they resided. The succession provisions adopted by DHCR, designed to prevent just such a situation, thus effectively advance the purposes for which the Rent Stabilization Law was enacted. Indeed, as this Court recognized in Lesser v. Park 65 Realty Corp. (supra, 140 AD2d, at 173), the succession provisions 'were included in the new Code to prevent the grievous harm that would ensue from the wholesale eviction of family members

which would otherwise be permitted under the laws set forth in the Sullivan decision (supra) and to address the inadequacies in this area of the law in light of its history." 145 AD2d 56-57.

In Braschi v. Stahl Associates Co., supra, the Court of Appeals extended the same non-eviction protection already afforded spouses and members of the named tenant's "family" under the New York City Rent Control Law to "two adult lifetime partners whose relationship is long term and characterized by an emotional and financial committment and interdependence." (Braschi v. Stahl Associates Co., supra at p. 211). In East 10th Street Associates v. Goldstein Estate (154 AD2d 142) this Court found the Braschi (supra) decision to be controlling precedent which required that the Braschi definition of family be applied in Rent Stabilization cases. Apart from the fact that Rent Stabilization is generally acknowledged as a "less onerous" system than rent control (Sullivan v. Brevard Associates, 66 NY2d 489, 494), this Court noted that "there is no significant distinction between the two regulatory schemes that would mandate a different definition of 'family'," (154 AD2d at 145). We noted as well that the Court in Braschi, supra, specifically placed its statement expanding the definition of the word "family", " '[i]n the context of eviction', not 'in the context of eviction from a rent controlled apartment'." (154 AD2d 145). We then concluded that "[i]t would be anomalous to hold that a life partner could be a valid family member for the purpose of protection from eviction from a rent-controlled apartment but not a valid family member insofar as eviction from a rent-stabilized apartment is concerned." Id.

In as much as the challenged regulations represent a codification of the Court of Appeals' decision in Braschi v. Stahl Associates, supra, and of this Court's decision in East 10th Street Associates v. Goldstein Estate, supra, and are a response to substantially the same public needs as the succession provisions approved in Festa v. Leshen, supra, there is little likelihood that plaintiffs will succeed on the merits of their challenge to the regulations on the grounds that their promulgation violates the policy of the statute which created the DHCR and exceeds the delegated authority of the agency. It is clear also that plaintiffs' challenge based upon the provision of the Omnibus Housing Act of 1983 (Laws of 1983, ch. 403 § 9) which provides that no provision of the Rent Stabilization Code "shall impair or diminish any right or remedy granted to any party by this law or any other provision of law" will not ultimately succeed.

This Court in Festa v. Leshen, supra, pp. 60-61 held that the provision was not a bar to the creation of succession rights for traditional family members. We stated that the fact "[t]hat no statute or regulation had previously restricted the contractual rights of the landlords to evict the family members of a tenant who had died or vacated rent-stabilized premises does not constitute the granting of a right. Rights are not conferred by the absence of a regulation." (145 AD2d at 61) We further noted that "by delegating to DHCR the authority to adopt an amendment to the Code which 'protects tenants and the public interest' (Administrative Code § 26-511[c] [1], formerly § YY51-6.0[c][1]), the Legislature clearly provided the agency with a broad mandate, which would inevitably require some changes in the legal relationship between landlords and tenants. The statutory proscription against the impairment of existing rights was intended to assure that any such changes be not inconsistent with the Rent Stabilization Law

or any other law." (Festa v. Leshen, supra p. 61). As with the succession provisions at issue in Festa v. Leshen, supra, the challenged provisions satisfy this requirement. By responding to the continuing shortage of low and middle income housing units available, the rise in instances of individuals "doubling-up" and tenants being forced into a homeless situation due to unaffordable rents, the regulations clearly comport with the broad mandate provided the DHCR by the Legislature to "protect tenants and the public interest". Since the new regulations incorporate the Braschi definition of "family" into the existing regulatory scheme, they do not conflict with Real Property Law § 226-b, which governs the assignment of leases, or with Real Property Law § 235-f, which makes it unlawful for a landlord to restrict occupancy of residential premises by express lease terms or otherwise, to a tenant or tenants or to such tenants, and immediate family.... The regulations deal with succession to leasehold rights, and with "family members" whether or not related by blood or law who have always treated the apartment as their family home, as opposed to "roommates". In Braschi v. Stahl Associates, supra, at p. 212, the Court noted that the approach mandated by its decision would "foster the transition from rent control to rent stabilization by drawing a distinction between those individuals who are, in fact, genuine family members and those who are mere roommates (see, Real Property Law § 235-f; Yorkshire Towers Co. v. Harpster, 134 Misc.2d 384) or newly discovered relatives hoping to inherit the rent controlled apartment after the existing tenant's death."

The argument that the regulations conflict with Domestic Relations Law § 11 requiring solemnization of a marriage is meritless, as the regulations do not remotely attempt to equate the special relationship defined therein as spousal, and specifically distinguish "husband" and "wife" from that relationship. The regulations do not attempt to confer any other protection or privilege than the protection from eviction upon the death or departure of the tenant of record.

Plaintiffs broadly contend that promulgation of the permanent regulation violates the doctrine of separation of powers, arguing that the DHCR overstepped the boundary of proper Administrative rule making and entered the realm of legislative policy making. The basis for plaintiff's claim is that since 1986 there have been approximately 27 bills introduced in the State Legislature concerning succession by "family members" and individuals "residing with" the tenant of record to the tenant's lease rights in rent regulated apartments, none of which were passed. Plaintiffs view the presentation and debate of such bills without the passage of any legislation as a tacit pronouncement of policy by the Legislature on the subject covered by the challenged regulations. Plaintiffs submit no authority for such argument.

While the line between administrative rule making and legislative policy making has been described as difficult to define in some cases, Boreali v. Axelrod, (71 NY2d 1, 11), such is not the case here. The Court in Boreali invalidated a comprehensive Public Health council (PHC) Code regulating tobacco smoking in areas open to the public, finding on the basis of four "coalescing circumstances" that the "difficult-to-define line between administrative rule-making has been transgressed" (supra, 71 NY2d, at 11) in that the regulations were enacted without legislative guidance in an area, where the Legislature had tried and failed to reach an agreement, and were riddled with exceptions based solely on economic and

12/6/90 N.Y.L.J. 21, (col. 3)

social concerns. By contrast, the regulations herein were enacted in response to the pronouncements of the Court of Appeals, in an area within the particular expertise of the agency and do not contain any exceptions but, rather, uniformly advance the policies of the regulatory scheme according to the mandate given the agency by the Legislature.

Plaintiffs, for the first time on appeal, argue that the permanent regulations are impermissibly vague because they provide no criteria for determining when a non-traditional relationship commences. The standards for evaluating vagueness were enunciated in Grayned v. City of Rockford, (408 U.S. 104, 108-109):

"Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications" (footnotes omitted).

These standards however, are not to be applied mechanically. "The degree of vagueness that the Constitution tolerates--as well as the relative importance of fair notice and fair enforcement--depends in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow ..." Village of Hoffman Estates v. The Flipside, Hoffman Estates Inc., (455 U.S. 489, 498).

Here, the challenged regulations set out eight specified factors to be employed in determining whether a family relationship exists. These factors are sufficiently definite to give a person of "ordinary intelligence" a "reasonable opportunity" to make that determination. The question of when such a relationship commences is, contrary to plaintiffs' view, a relatively straight forward factual one, which can be determined in terms of those same eight factors. Aspects of the relationship from the date intermingling and joint ownership of assets began, to when the two individuals began a close relationship with each other's relatives can be examined to determine when the "family relationship" truly commenced. To the extent that the regulations codify the Braschi decision they draw "a distinction between those individuals who are in fact, genuine family members, and those who are mere roommates (citations omitted) or newly discovered relatives hoping to inherit the rent controlled [or rent-stabilized] apartment after the existing tenant's death [or departure]" (see, Braschi, supra, at p. 212), and provide definite means with which to draw that distinction. [FN4]

Plaintiffs advance various constitutional challenges to the regulations all based on the contention that the regulations effect unconstitutional physical and/or regulatory takings which effectively deprive the landlord of the use of the property indefinitely, without just compensation. Plaintiffs argue that the regulations violate the constitutional guarantee against the taking of private property for public use without just compensation by "removing all control from the landlord and placing permanent occupancy, dominion and control over the

12/6/90 N.Y.L.J. 21, (col. 3)

landlord's property with the tenant". This conclusion is based upon the plaintiffs' view that the regulations permit "permanent and multi-generational occupancy by strangers."

The New York State Court of Appeals and the U.S. Supreme Court have upheld rent control and similar regulation of housing conditions and other aspects of the landlord-tenant relationship (see, Bowles v. Willingham, 321 US 503, 517-518; Loab Estates v. Druhe, 300 NY 176, 180; Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242; and Block v. Hirsch, 256 U.S. 135). The challenged regulations do not fundamentally change the nature of the Rent Control and Rent Stabilizations systems so as to authorize "the permanent occupation of the landlord's property by a third party" of the sort, which traditionally, has been held to be a "taking", (see, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 440-441). These regulations expand the definition of those individuals entitled to succeed to the tenant-of-record's lease rights by virtue of their familial relationship with the tenant. Like rent control and other regulations that have been upheld by this Court, the Court of Appeals and the U.S. Supreme Court, the regulations herein involve "restrictions imposed upon existing tenancies where the landlords had voluntarily put their properties to use for residential housing", (see, Seawall Associates v. City of New York, 74 NY2d 92, 105 cert. denied, --- U.S. ----, 110 S.Ct. 500). Thus they are to be distinguished from the regulations at issue in Seawall Associates v. City of New York, supra, which were found by the Court of Appeals to force owners to subject their properties to a use which they neither planned nor desired (Seawall, supra at 105), [FN5] and to offer their properties for rent as SRO units to persons with whom they had no existing landlord-tenant relationship. The plaintiffs' fear that the nature of the non-traditional relationship, as defined in the regulations, will permit "permanent and multi-generational occupancy by strangers" is an unfounded one, apparently based, in part at least, on the assumption that the regulations allow room for fraud. The permanency of the occupancy by the non-traditional family member is no greater that than of a traditional family member. Moreover, the definition of the relationship provided in the regulation is not so nonspecific or general as to allow for abuse. The successors to the tenant's lease rights must demonstrate a close, "familial" connection to the tenant and to the apartment. Thus such individuals are not mere "third-parties" or "strangers" to the tenancy.

Plaintiffs argument that the regulations effect an uncompensated regulatory taking is based upon the contention that the broadening of the definition of those entitled to succession rights denies the landlords the economically viable use of the properties, by effectively extinguishing the landlords expectation of a residual or reversionary interest in the apartments. According to the plaintiffs this results because the regulations permit succession to a broad indefinite class of people predicated upon two years of occupancy or even less. As has already been discussed in connection with the "vagueness" argument advanced by the plaintiffs, it is clear that the regulations specifically define a narrow class of individuals who are entitled to succession.

The regulations here at issue are distinguishable from those involved in 520 East 81st Street Associates v. Lenox Hill Hospital, (157 AD2d 138, appeal withdrawn 76 NY2d 851). In 520 East 81st Street Associates v. Lenox Hill Hospital, supra, the regulations at issue provided an exception to the nonprimary

12/6/90 N.Y.L.J. 21, (col. 3)

residence exemption in the Rent Stabilization Law where a not-for-profit hospital is the lease's named tenant (laws of 1989 ch. 940). This Court found that because Lenox Hill Hospital had been in existence since June 29, 1918, and showed no signs of ceasing operations, the landlord was "effectively precluded from regaining possession of its property" primarily because Lenox Hill could use the apartments as a dormitory "in perpetuity" (supra, at pp. 146-147). Moreover this Court found that by providing the hospital with a virtual fee interest in the property, the regulations as applied would increase "the dislocation of long-term tenants, thereby contravening the purpose of rent stabilization, by requiring Lenox Hill to remove long-term occupants if they terminate their employment with it" (supra, at p. 149). We stated that the policy of promoting better health care should not be "furthered by interpreting the Rent Stabilization Law so as to exacerbate the very housing emergency which rent stabilization was enacted to address" (supra, at p. 150).

The occupancy herein is necessarily limited by the lifetime of the succeeding "family member", which is no greater than that of any other traditional relation entitled to succession prior to Braschi, supra. The possession and use of the property in perpetuity is simply not a potential result herein. The landlord is not required to issue renewal leases to an institution with perpetual existence, but rather to natural persons, whose primary residence was already in the landlord's building. The plaintiffs have not shown that they will be able to demonstrate that the regulations prevent them from obtaining a reasonable return on their property. Moreover, unlike the regulations in 520 East 81st Street Associates, supra, the regulations here at issue advance the intended purposes of the Rent Stabilization and Rent Control succession provisions--to prevent the eviction of individuals with substantial ties to their home-apartment and to the former tenant of record. Thus since the plaintiffs will not be able to demonstrate that the regulations do not substantially advance a legitimate state interest or that they deny landlords economically viable use of their property (see, Seawall Associates v. City of New York, supra, at p. 107), plaintiffs' challenge based upon the theory that the regulations constitute a regulatory taking will also necessarily fail.

Plaintiffs, though they have strenuously and competently argued, have failed to demonstrate that they have a likelihood to succeed on the merits, in their challenge to the regulations. They are, therefore, not entitled to the injunctive relief that they were granted below (Grant Co. v. Srogi, supra).

Accordingly, the order of Supreme Court, New York County (Irma Vidal Santaella, J.), entered April 20, 1990, and deemed as one granting a preliminary injunction, is reversed, on the law, the facts and in the exercise of discretion, and the injunction vacated, with costs. We decline to reach the plaintiffs' appeal from the order, entered April 10, 1990, which denied their application for an order holding the defendant Commissioner in contempt for allegedly violating the original temporary restraining order made with respect to the emergency rule, and dismiss that appeal as moot, without costs.

All Concur.

12/6/90 N.Y.L.J. 21, (col. 3)

FN1 The State Rent and Eviction Regulations, 9 NYCRR §§ 2100-2109 (Rent Control Outside of New York City); (2) The Rent and Eviction Regulations for the City of New York, 9 NYCRR §§ 2200 to 2210 (Rent Control within New York City); (3) The Emergency Tenant Protection Regulations, 9 NYCRR §§ 2500 to 2510 (Rent Stabilization Outside New York City); (4) The Rent Stabilization Code, 9 NYCRR §§ 2520 to 2530 (Rent Stabilization within New York City) see, McKinney's Unconsol.Laws, Book 65 sections 8581-8700, 1987 and supp.

FN2 The above cited regulations were enacted in May 1987 in order to conform the Rent Stabilization Law to the Rent Control Law, which prohibited the eviction of an occupant of a rent-controlled housing accommodation who had been living with the tenant, and was either a surviving spouse or some other member of the deceased tenant's family. (State Rent and Eviction Regulations § 56d; 9 NYCRR § 2104.6[d] . The rent control regulations for the City of New York contained the same provision, 9 NYCRR 2204.6[d]. This Court upheld the Rent Stabilization regulations concerning succession rights in Festa v. Leshen, (145 AD2d 49).

FN3 We have a most unusual situation in that at least 10 briefs (four of them amicus curiae) have been submitted with reference to the merits of the permanent regulations, as well as four briefs with reference to the question of contempt, where the IAS Court is yet to write a single sentence on either issue. Nevertheless, we must accept Appeal # 1 (rather than dismiss same), as in our previous denial of plaintiffs' motion to dismiss that appeal, we sua sponte deemed that appeal to be from a grant of a preliminary injunction, which was the eventual result of repeated extensions of the TRO.

FN4 The argument advanced by plaintiffs that there is no basis upon which to protect family members of tenants of record who abandon the apartment rather than die is meritless. Matter of Herzog v. Joy, (53 NY2d 821 affg, 74 AD2d 372), Festa v. Leshen, supra, and Braschi, supra, make clear that the distinction between death and abandonment of the premises by the tenant of record, has itself been abandoned by the Courts.

FN5 The statute struck down by the Court of Appeals in Seawall supra, imposed a moratorium on the demolition or conversion of structures containing SRO (single room occupancy) units and required owners of SRO properties to rehabilitate all vacant units and offer them for rent. The statute imposed substantial monetary penalties for noncompliance.

12/6/90 NYLJ 21, (col. 3)

END OF DOCUMENT